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No. 07-262

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SUPREME COURT, U.S.

In The Supreme Court of the United States

LESPIA KING,

Petitioner,

JENNIFER DONOVAN, MALINDA BLAND, KRISTIN DARNELL, TAMARA SPEIGHT, ERIN BACHINSKY, and ANGELA LINKOUS,

Intervenors,

v.

GEORGE M. MCMILLAN, SHERIFF, and ROANOKE CITY SHERIFF'S OFFICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether petitioners have presented compelling reasons to grant the petition where the Fourth Circuit's opinion does not conflict with a decision of this Court or a court of appeals and found it unnecessary to address the single-filing rule?

II. Whether petitioners have presented compelling reasons to grant the petition where the district court properly exercised its discretion in denying the motion to intervene and the Fourth Circuit did not hold that Rule 24 requires more than a single intervenor?

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STATEMENT OF THE CASE

This action was preceded by an EEOC charge on October 12, 2004 alleging sexual harassment, a hostile work environment and constructive discharge by plaintiff Lespia King (hereinafter "plaintiff" or "King"). (Pet. App. At 125-131). In that charge, plaintiff stated that she began working for Sheriff McMillan (hereinafter "defendant" or "Sheriff") in August 2000 and that sexual harassment by the Sheriff began in January 2003.[1] (Pet. App. at 127). She complained of his conduct during a meeting with her about a shift transfer in January 2003, during their attendance at a Western Regional Jail Association dinner in October 2003, and during a conversation on March 10, 2004 after she applied for another job. Plaintiff then resigned in March 2004. (Pet. App. at 131). Plaintiff did not bring a class charge or indicate that she was filing on behalf of others and did not give notice in any way that she was pursuing a charge for anyone other than herself. As the district court noted, King "only referred to the experiences of other women in the closing sentence of the charge, stating, 'I believe that the department and the sheriff have treated other females similarly....'" (Pet. App. at 131).

Plaintiff received a right to sue notice on June 8, 2005, and filed this Title VII case on August 16, 2005. Plaintiff alleged that sex discrimination/harassment and a hostile work environment existed from January 2003 until she resigned and was allegedly constructively discharged in March 2004. (Pet. App. at 116). She then made factual allegations concerning limited events after she began

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[1] King continually implies that her EEOC charge alleged a hostile work environment and sexual harassment throughout her tenure with the Sheriff. This is not the case. The EEOC charge states that harassment began in January 2003 and cites to no conduct occurring prior to January 2003.

employment in August 2000 and prior to January 2003. (Pet. App. at 116-17). The complaint filed by plaintiff purports only to be an action by one individual. (Pet. App. at 115-122). Sheriff McMillan answered the suit and denied the allegations.

On September 16, 2005, more than 90 days after the issuance of the right to sue notice, plaintiff filed a motion to certify a class action. (Pet. App. at 77). On October 7, 2005, a motion to intervene pursuant to Rule 24 was filed by Jennifer Donovan, Malinda Bland, Kristin Darnell, Tamara Speight, Erin Bachinsky and Angela Linkous (collectively, the "putative intervenors"). (Pet. App. at 30-31). By order entered October 20, 2005, the district court denied plaintiff's motion to certify a class action. (Pet. App. at 16.) The court found that plaintiff "failed to bring her class action within the statutory 90-day period." (Pet. App. at 20). The court also noted that it appeared that the claims of at least four women were time-barred and that the requirement that class members share questions of law and fact was not met. (Pet. App. at 22). On January 5, 2006, the district court denied the motion to intervene "[b]ecause King's EEOC charge did not forecast a collective action, because the putative plaintiffs' claims are factually dissimilar, and because five of the six putative plaintiffs could not have filed timely charges with the EEOC at the time King filed hers...." (Pet. App. at 10-15).

The Fourth Circuit Court of Appeals affirmed the denial of the motion to intervene finding it unnecessary to decide "whether to join those circuits that apply the single-filing rule to non-class actions because we conclude that the rule would not be properly applied in this case." (Pet. App. at 6). The Fourth Circuit found that the claims by five of the six putative intervenors were barred and that the single filing rule would not apply where there are only two complainants.

(Pet. App. at 6-7). This petition followed the denial of motions for rehearing.

The district court found that the alleged experiences of the plaintiffs "contrast sharply" and present "differing questions of fact and law." (Pet. App. at 14). The declarations of former employees Jennifer Donovan, Kristen Darnell and Malinda Bland and the declarations filed by the Sheriff in opposition to the motion to certify class action and the motion to intervene point out the stark differences in, and the individual nature of, the allegations. For example, Donovan, Darnell and Bland all allege that they were harassed while they were interviewed for employment and went to work for the Sheriff despite the harassment. (Pet. App. at 47, 50, 52). King makes no such allegations.

Donovan was employed from January through October 2002 – a time period that predates the harassment plaintiff alleged in her EEOC charge. Donovan had job performance issues as she could not complete her assignments on time and had others performing her duties for her. She resigned after being told that the Sheriff may not continue to employ her. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 2, ¶2).

Darnell was employed by the Sheriff on two separate occasions. (Pet. App. at 50). Both periods of employment predate the harassment alleged by plaintiff in the EEOC charge. She began employment in December 2000 and resigned in April 2001 when she moved to Florida to be with her mother and to go to school. Despite alleged harassment during her interview and earlier employment, she then returned to employment with the Sheriff in January 2002 and resigned in August 2002. (Pet. App. at 51). During this second period of employment, she had numerous job performance issues. Shortly before she resigned, she received a written reprimand and Major Brubaker was

beginning the process to terminate Darnell. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 3, ¶3) In May 2005, Darnell called the Sheriff and requested a job, yet again, with the Sheriff's office. (Memo in Opp. to Mot. to Certify Class Action, Exhibit 2, ¶5)

Bland claims an employment period of one week in August 2004, months after plaintiff's resignation. (Pet. App. at 52). She alleges that she was paid more money than other deputies. As alleged by Bland, the Sheriff told her that one of the judges stated that she had prostituted herself to him. (Pet. App. at 53). Indeed, on that day, the Sheriff learned that while Bland toured the courthouse and was introduced, she told a local circuit court judge, who was celebrating his birthday, that she liked older men and that this might be his lucky day. (Memo. in Opp. to Mot. To Certify Class Action, Exhibit 4, ¶ 2). Bland did not return to work after this. (Pet. App. at 54).

The other three declarations are from persons who were never employed by the Sheriff. Bachinsky was merely interviewed for a position in January or March 2002 (Pet. App. at 56-57; Supp. Memo in Opp. to Mot. to Certify Class Action, Exhibit 1, ¶3), and Speight and Linkous were employed to work at the jail by Prison Health Services, an independent contractor. (Pet. App. at 55, 59). Linkous worked for Prison Health Services from August 2001 until February 2003, and Speight worked for Prison Health Services from June 2000 until October 2001.

REASONS FOR DENYING THE PETITION

Plaintiff and the putative intervenors (collectively "plaintiffs") have not presented compelling reasons for review by the Court, as required by Rule 10 of the Supreme Court Rules, because this case did not create a conflict among the courts of appeals and does not involve an important question of federal law undecided by this Court or in conflict with a decision of this Court. The case involves only the disallowance of stale claims and the exercise of discretion in denying a motion to intervene under Rule 24 of the Federal Rules of Civil Procedure.

I. The Single-Filing Rule is Irrelevant to this Case.

Plaintiffs urge this Court to adopt the single-filing rule adopted by some courts of appeals and state that "the Fourth Circuit erred in failing to adopt the single-filing rule." (Pet. at 15). The single-filing rule "allows plaintiffs who have not exhausted the administrative requirement of filing with the EEOC to join in a lawsuit with other plaintiffs who have exhausted the requirement, provided that all plaintiffs' claims are substantially similar and that the EEOC charge itself gave notice of the charge's collective nature." *White v. BFI Waste Services, LLC*, 375 F.3d 288, 293 (4th Cir. 2004) (citations omitted). Additionally, an intervenor "must have been able to file a timely charge on the date that the original individual did so." *Bryson v. Fluor Corp.*, 914 F. Supp. 1292, 1296 (W.D.S.C. 1995) (citing *Tolliver*, and *Pandis v. Sikorsky Aircraft Div.*, 431 F. Supp. 793, 798 (D. Conn. 1977)). *See also Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (only class members who could have filed timely charge when class representative filed can be included).

As other courts of appeals have done, the Fourth Circuit has recognized the single-filing rule in the context of persons seeking to intervene as representatives in a class action. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984). In *Lilly*, the court allowed the intervenors to join the class action as representatives with regard to promotion where the claims are "so similar that it can fairly be said that no further conciliatory purpose would be served by filing separate EEOC charges...." *Id.* at 335. It noted that the intervention is not appropriate if "there is a real possibility that one of the claims might be administratively settled while the other can be resolved only in the courts...." *Id.*

More recently, the Fourth Circuit noted that it had not yet adopted, or rejected, the single-filing rule outside the class action context. *White*, 375 F.3d at 293. The court did not have to reach the issue in *White*. Likewise, in this case, the Fourth Circuit did not find it necessary in this case to decide whether or not to adopt the single-filing rule outside the context of class action suits because, even if adopted, the rule could not be properly applied here. Different circuits have developed different tests in order for a person who has not exhausted administrative remedies to piggyback on to a lawsuit of someone who has exhausted administrative remedies. "The most liberal test requires only that the claims of the timely claimant and the piggybacking claimant arise out of the same circumstances and occur within the same general time frame." *Bryson*, 914 F. Supp. at 1296 (citing *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 195 (6th Cir.), *cert. denied*, 516 U.S. 943 (1995)). *See also Horton v. Jackson County Bd. Of County Com'rs*, 343 F.3d 897 (7th Cir. 2003)[2]; *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988). "A more

[2] *Horton* includes a discussion as to why the single-filing rule is questionable when applied outside the class-action context, and McMillan concurs with this reasoning.

moderate test requires that the EEOC charge give notice that the discrimination is 'class-wide.'" *Bryson*, 914 F. Supp. at 1296 (citing *Howlett*). "Finally, the strictest test requires the EEOC charge to allege both discrimination against a class and that the claimant purports to represent the class or others similarly situated." *Id.*

Intervenors in the case at hand cannot meet even the most liberal test. Five of the six putative intervenors could not have filed a timely charge on the date the King did. All intervenors except Bland were time-barred. The incidents alleged by the intervenors did not occur within the same general time frame as the incidents alleged by King. Indeed, Bland alleges an incident in August 2004 when King left the Sheriff's office in March 2004.

Certainly, if notice of "class-wide" discrimination or a collective action is required in the EEOC charge, that requirement has not been met. The requirement of filing a charge with the EEOC serves the purpose of putting the employer on notice and allowing an opportunity for conciliation. *Lilly*, 720 F.2d at 335. King's EEOC charge goes on at length about her individual circumstances. Only in her last sentence does she say that "I believe that the department and the sheriff have treated other females similarly...." (Pet. App. at 131). This vague statement of belief is entirely insufficient to put the Sheriff on notice of other claims occurring at various alleged time periods. Moreover, as one court has noted, the single-filing rule makes little sense in the context of only two claims, "in which the rationale of the doctrine is attenuated to the point of nonexistence." *Horton*, 343 F.3d at 900. The same court also stressed the requirement that the cases "arise from the same set of facts rather than merely from facts that resemble each other" otherwise "courts will perforce be excusing the filing of a timely charge in *every* case in which an employee

alleges retaliation for supporting another employee's charge." *Id.* at 901.

In this case, the claims do not arise from the same set of facts and are not similar. Two of the intervenors did not work for the Sheriff, but worked for Prison Health Services. One intervenor never worked for the Sheriff, but was interviewed for a position. None of the intervenors indicate that they were witness to or present when the King incidents allegedly occurred. As the district court stated in its opinion denying class certification, "[t]he experiences of the six women to whom King has directed the court's attention vary dramatically." (Pet. App. at 22).

Plaintiffs have failed to cite to any case in which the single-filing rule was applied to revive long dead claims. Five of the six women seeking to intervene in this case assert claims that could not have been filed with the EEOC when plaintiff filed her EEOC charge.[3] The claims were more than 300 days old when plaintiff filed her charge. These stale charges cannot be refreshed years later through a motion to intervene. The statute of limitations and lack of notice and due process to defendant do not allow new life to be breathed into such claims through a motion to intervene.

With regard to intervenors, this Court looks to whether the statute of limitations has run. In *American Pipe v. Utah*, 414 U.S. 538 (1974), when the district court denied class certification, several putative class members moved to intervene. In that case, although the statute of limitations had run as to the intervenors, this Court held that their claims

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[3] King's EEOC charge was filed on October 12, 2004. Three hundred days before that date is December 17, 2003. Before December 17, 2003, all of the putative plaintiffs, except Bland, left the Sheriff's employment, left employment by Prison Health Services, or had been interviewed and not hired. Bland had not yet been employed for her week of employment in August 2004.

were not time-barred because the filing of the putative class action tolled the statute of limitations with regard to the putative class members. *American Pipe*, 414 U.S. at 552-53. In this case, the statute of limitations expired before the filing of the motion to certify a class so tolling is of no assistance to the intervenors.

In *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987), *rev'd in part on other grounds*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), in a claim involving the federal government, forty-four plaintiffs tried to intervene in a lawsuit after class certification was denied. In considering the motion to intervene, the court noted with approval that the trial court "held that any claim occurring more than thirty (30) days prior to the initiation of plaintiffs' ... informal administrative class complaint ... was untimely." *Harris*, 679 F. Supp. at 1229 (citing *American Pipe*). *See also Donald v. Edwards*, 705 F.2d 452 (6th Cir. 1982) (named plaintiff may represent only those class members who could have filed a timely charge on the same day – stale claims may not be resurrected) (citations omitted).

Plaintiffs claim that because this Court held that hostile work environment plaintiffs may rely upon behavior outside the statutory time period "so long as an act contributing to that hostile environment takes place within the statutory time period." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002); (Pet. at 16). Plaintiffs then attempt to extend the holding of *Morgan* to conclude that putative intervenors need not have a claim that could be timely asserted when King filed her charge because King alleged a hostile work environment. (Pet. at 16). This reasoning is without any support in case law and would allow an unlimited number of former employees to file claims that should have been asserted long ago to join in a Title VII case as long as the plaintiff filing a charge alleged a

hostile work environment. The single-filing rule as proposed by plaintiffs would then completely eliminate the statutory time requirements in hostile environment cases.

II. There was No Abuse of Discretion with regard to the Finding that Plaintiffs did not Meet the Requirements of Rule 24.

Finally, the putative intervenors cannot meet the requirements for intervention of right or permissive intervention under Rule 24 of the Federal Rules of Civil Procedure. If plaintiff prevails, the putative plaintiffs would not be barred by that decision from asserting their claims and their claims are not factually similar.

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, intervention of right is only allowed, upon timely application, when a statute confers such right or "when the applicant claims an interest relating to the ... transaction ... and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest...." Fed. R. Civ. P. 24(a).

As the district court properly found, "there is little or no danger 'that the disposition of the action may as a practical matter impair or impede [the putative intervenors'] abilit[ies] to protect [their] interest[s].'" (Pet. App. 13, n.2). The allegations of the putative intervenors vary substantially from plaintiff's allegations and from each others' allegations. The allegations do not involve a certain policy or the same incident, so there is no danger of a decision that would impair the putative intervenors' ability to bring their own

lawsuits.[4] To accept the argument that a decision in the King case would essentially amount to *stare decisis* in the putative intervenors' claims would be to require all sexual harassment cases involving the same alleged harasser to be multi-plaintiff actions regardless of the allegations. Moreover, the fact that the putative intervenors may be barred by a statute of limitations does not constitute impairment of their interests because they would not be impaired because of any judgment in the underlying case. *See United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999).

With regard to permissive intervention, Rule 24(b) of the Federal Rules of Civil Procedure states that a person may intervene in an action, upon timely application, "when an applicant's claim or defense and the main action have a question of law or fact in common." Additionally, the Rule notes that courts shall consider any delay or prejudice to the parties. Fed. R. Civ. P. 24(b).

Sexual harassment cases and disparate treatment cases, unlike disparate impact cases, turn on individual allegations and fact specific inquiries. Thus, these cases are less likely than disparate impact cases to meet the requirement of common questions of law or fact. See, *e.g.*, *Stastny v. Southern Bell Telephone and Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980); *Talley v. ARINC, Inc.*, 2004 WL 1572650 (D. Md. July 14, 2004); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 470 (D. Md. 2002), *aff'd sub nom*, *Skipper v. Giant Food, Inc.*, 68 Fed. Appx. 393 (4th Cir.), *cert. denied*, 540 U.S. 1074 (2003).

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[4] The *Foster v. Gueory* case, extensively relied upon by the putative intervenors, differs from this case in that the claims of the intervenors in *Foster* were "essentially identical" to those of the plaintiff with the exception of union membership. 655 F.2d 1319, 1322 (D.C. Cir. 1981).

In this case, plaintiff alleges gender discrimination, sexual harassment in the form of a hostile work environment, and constructive discharge under circumstances where plaintiff was performing her job adequately. Unlike plaintiff, the putative intervenors attempt to assert claims of harassment in the interview process, constructive discharge under circumstances where they were not performing their jobs adequately, and retaliation. These are not common questions of law and fact. With regard to constructive discharge, specific facts with regard to each person are integral to a determination with regard to the employer's intent. Sporadic, isolated incidents are alleged involving one individual plaintiff or putative intervenor in each incident over a period of years.

It is not alleged that the plaintiff or putative intervenors witnessed the incidents as to the others or that they were all part of the same incident. If the motion to intervene were granted, the trial court would have to explore the individual issues of job performance, the questionable allegations of the putative intervenors that they were harassed during an interview and then accepted employment, the facts surrounding Darnell's decision to return to the office a second time and request a third employment, the circumstances surrounding Bland's inappropriate remarks to a judge, and the individual circumstances surrounding alleged constructive discharges. The claims have little in common with one another, and the district court's denial of the motion to intervene was within its discretion.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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